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No. 08-600

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In the Supreme Court of the United States

ZOYA ATAMIRZAYEVA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a foreign national with no connection to the United States may assert a claim under the Just Compensation Clause of the Fifth Amendment for the taking of property in a foreign country.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 524 F.3d 1320. The opinion of the Court of Federal Claims (Pet. App. 21-46) is reported at 77 Fed. Cl. 378.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2008. A petition for rehearing was denied on August 5, 2008 (Pet. App. 48-49). The petition for a writ of certiorari was filed on November 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a citizen and resident of Uzbekistan, owned a cafeteria near the United States Embassy in Tashkent, Uzbekistan. Pet. App. 51-52. Petitioner al-

leges that the United States demanded that local authorities destroy her cafeteria "for the sake of the security of the [United States] Embassy." *Id.* at 56. She further alleges that, on or about December 23, 1999, local authorities, "act[ing] at the demand of the U.S. Embassy in Tashkent and for its benefit," destroyed the cafeteria. *Ibid.*

2. Petitioner brought this action against the United States in the Court of Federal Claims, seeking compensation for the taking of her property. Pet. App. 50-61. The court dismissed the complaint. *Id.* at 21-46. The court acknowledged "the general principle that the Takings Clause of the Fifth Amendment has extraterritorial application," *id.* at 41, in the sense that nonresident aliens may seek just compensation for the taking of property located within the United States, and United States citizens may seek just compensation for the taking of property located outside the United States, *id.* at 39. But the court held that, to pursue a claim for just compensation for a taking of foreign property, a nonresident alien must, as a threshold matter, demonstrate "substantial connections" to the United States. *Id.* at 41. Since petitioner "failed to demonstrate any substantial connections to the United States," the court concluded that petitioner could not assert a claim under the Just Compensation Clause for the taking of property in a foreign country. *Id.* at 46.

The Court of Federal Claims went on to explain that, even when a plaintiff does have substantial connections to the United States, a court must "look at the involvement of the United States in the taking" and must determine "whether the Takings Clause could be applied 'without inconvenience or practical difficulty.'" Pet. App. 41 (quoting *Turney* v. *United States*, 126 Ct. Cl. 202, 215

(1953)). The court observed that adjudicating the claim in this case might "very well" present "practical difficulty" because "relations between the United States and Uzbekistan are strained," and Uzbekistan has an authoritarian government with no independent judicial system. *Id.* at 41 n.15; see *id.* at 45 ("[E]ven if substantial connections with the United States are not required, Plaintiff may have a hard time passing the 'without inconvenience and practical difficulty' test of *Turney*.").

3. The court of appeals affirmed. Pet. App. 1-20. The court began by surveying this Court's "cases involving the extraterritorial application of constitutional provisions." *Id.* at 3; see *id.* at 4-12 (citing *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990); *Reid* v. *Covert*, 354 U.S. 1 (1957); *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); several of the *Insular Cases*[*]; and *In re Ross*, 140 U.S. 453 (1891)). Based on its analysis of those cases, the court rejected petitioner's contention "that the Fifth Amendment protects the foreign property of citizens of every foreign country without regard to their connections with the United States." *Id.* at 17. In particular, the court emphasized that *Verdugo-Urquidez* reaffirmed *Eisentrager*'s rejection of "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Id.* at 10 (quoting *Verdugo-Urquidez*, 494 U.S. at 269).

Petitioner relied on the Court of Claims' decision in *Turney*, *supra*, which allowed a Philippine corporation to bring a claim against the United States for just compensation for the taking of property located in the Phil-

[*] *Balzac* v. *Porto Rico*, 258 U.S. 298 (1922); *Dorr* v. *United States*, 195 U.S. 138 (1904); *Hawaii* v. *Mankichi*, 190 U.S. 197 (1903); and *Downes* v. *Bidwell*, 182 U.S. 244 (1901).

ippines. In petitioner's view, *Turney* established that "a non-resident alien [need not] show any connection to the United States in order to assert a takings claim for overseas property." Pet. App. 13. The court of appeals explained, however, that "the claimant in *Turney*," unlike petitioner, had "significant connections to the United States." *Id.* at 17. And the court also noted that interpreting *Turney* as petitioner urged "would be in tension with the Supreme Court's subsequent decision in *Verdugo-Urquidez*." *Id.* at 18.

4. Petitioner filed a petition for rehearing en banc, arguing that the decision of the court of appeals conflicted with this Court's decision in *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008), which was issued shortly after the panel's decision. The court of appeals denied the petition for rehearing. Pet. App. 48-49.

ARGUMENT

The court of appeals correctly held that aliens who lack any connection to the United States may not assert claims under the Just Compensation Clause for the taking of property in foreign countries. That holding is consistent with this Court's decisions in *Johnson* v. *Eisentrager*, 339 U.S. 763, 781-785 (1950), and *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), and it does not conflict with any decision of any other court of appeals. Further review is not warranted.

1. This Court has repeatedly reaffirmed "that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001). In particular, the Fifth Amendment does not apply to aliens who have no presence in any territory over which the United States is sovereign.

Verdugo-Urquidez, 494 U.S. at 269 ("[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."); *Zadvydas*, 533 U.S. at 693 (citing *Verdugo-Urquidez* for the proposition that the "Fifth Amendment's protections do not extend to aliens outside the territorial boundaries" of the United States); *Eisentrager*, 339 U.S. at 783 (finding "no authority whatever" supporting the contention "that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located"). The court of appeals correctly applied those precedents when it determined that petitioner—an alien who does not allege that she has any connection to the United States—could not assert a claim under the Fifth Amendment for the taking of property located in Uzbekistan.

2. Petitioner asserts (Pet. 10-11) that the decision below conflicts with *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008), which held that aliens detained as enemy combatants at the United States Naval Base at Guantanamo Bay, Cuba, enjoy rights under the Suspension Clause of the Constitution, Art. I, § 9, cl. 2. Petitioner is incorrect for two reasons.

First, the Court's decision in *Boumediene* was grounded on the unique status of Guantanamo Bay, and specifically what the Court described as "the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory." 128 S. Ct. at 2253. The opinion repeatedly emphasized the unusual status of Guantanamo Bay. See, *e.g.*, *id.* at 2252 ("Cuba effectively has no rights as a sovereign."); *id.* at 2258 ("The United States has maintained complete and uninterrupted control of the bay for over 100 years."); *id.* at

2261 ("In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States."); *id.* at 2262 (describing Guantanamo Bay as "territory that, while technically not part of the United States, is under the complete and total control of our Government"). Here, by contrast, the United States lacked both sovereignty and practical control over the property at issue. According to the complaint, it was the government of Uzbekistan, not the United States, that owned the land on which petitioner's cafeteria was located and that carried out the destruction of the cafeteria. Pet. App. 50, 52, 56. Thus, both the "formal legal status" and the "objective degree of control the United States asserted" over the property are dramatically different from *Boumediene* and do not support application of the Just Compensation Clause. 128 S. Ct. at 2258.

Second, *Boumediene* concerned only the Suspension Clause of the Constitution, and it did not address the applicability of the Fifth Amendment. See 128 S. Ct. at 2244. The Court's application of its functional test for extraterritoriality was entirely focused on the Suspension Clause, see *id.* at 2259-2262, and the Court stated its holding narrowly: "We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay," *id.* at 2262. The Court in *Boumediene* did not overrule precedents governing the extraterritorial application of the Fifth Amendment. To the contrary, the Court reaffirmed the validity of *Eisentrager*; it simply distinguished that case, even as to the application of the Suspension Clause, on the ground that, unlike Guantanamo Bay, "the United States' control over the prison in [*Eisentrager*] was neither absolute nor indefinite." 128 S. Ct. at 2260. That observation highlights the continuing applicability of *Eisentrager*'s Fifth Amendment rul-

ing, especially in the circumstances presented here, because the United States had even less control over petitioner's cafeteria in Uzbekistan than it did over the prison in occupied Germany that was at issue in *Eisentrager*.

3. Petitioner asserts (Pet. 8-9) that the court of appeals "established a rigid rule" requiring foreign nationals pursuing a Fifth Amendment taking claim to have "some preexisting substantial connection with the United States." In fact, the court rejected petitioner's suggestion that it adopt a "blanket rule" that "the Fifth Amendment protects the foreign property of citizens of every foreign country without regard to their connections with the United States." Pet. App. 17. In rejecting that proposal, the court grounded its decision on petitioner's lack of "*any relationship*, business or otherwise, with the United States." *Ibid.* (emphasis added); see *id.* at 19 (noting "the absence of *any* allegation of a relationship between the plaintiff and the United States") (emphasis added). This Court has never held that a person in petitioner's circumstances—a foreign national with no connection whatsoever to the United States who claims a taking of property in a foreign country over which the United States had no sovereignty or control—is entitled to the protections of the Constitution.

Similarly misplaced is petitioner's suggestion (Pet. 9) that, under the decision below, foreign nationals could pursue takings claims "if they happened, fortuitously, to have some unrelated connection with the United States." The court of appeals did not adopt any such "arbitrary standard." Pet. 11. Because petitioner alleged no relationship at all with the United States, the court did not consider what type of relationship would be sufficient to allow an alien to bring a claim under the Just Compensa-

tion Clause. Nothing in the court's opinion support's petitioner's assertion (Pet. 13) that she would have been able to pursue her claim simply by alleging that she had "vacationed at Disney World."

4. Finally, petitioner (Pet. 13-15) asserts that it would not be impractical to apply the Just Compensation Clause extraterritorially. Because petitioner lacks any connection to the United States, the court of appeals had no need to consider that issue. But as the Court of Federal Claims observed, petitioner's complaint makes clear that practical considerations also weigh against her claim. Petitioner alleged that "Uzbekistan presents severe terrorist risks to U.S. interests," Pet. App. 53, and that "the U.S. Embassy in Tashkent was at risk of terrorist attack," *id.* at 54. Thus, as in *Eisentrager*, the United States "faced potential security threats" in Uzbekistan, as well as potential "friction with the host government," making extraterritorial application of the Fifth Amendment particularly inappropriate in this case. *Boumediene*, 128 S. Ct. at 2261; see Pet. App. 41 n.15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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